No. 802

In the
Supreme Court of the United States

October Term, 1943

THE INDEPENDENT ASSOCIATION OF MILL WORKERS,

THE INDEPENDENT ASSOCIATION OF MINE WORKERS,

UTAH COPPER COMPANY, a corporation, and

KENNECOTT COPPER CORPORATION, a corporation,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered December 27, 1943, rehearing denied February 8, 1944.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 1575) and the dissenting opinion of Judge Orie L. Phillips (R. 1580) are not as yet reported. The decision and order of the National Labor Relations Board will be found in the record at page 176, and the Intermediate Report at page 66.

JURISDICTION

The decree of the Circuit Court of Appeals was entered December 27, 1943 (R. 1582). Petition for rehearing (R. 1585) was denied February 8, 1944 (R. 1601). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act [29 U. S. C. § 160(e) (f)].

QUESTIONS PRESENTED

1. Under the provisions of Section 10(e) and (f) of the National Labor Relations Act [49 Stat. 449, 29 U. S. C. § 160(e) and (f)], if there be a part of, or circumstance in, the testimony that when removed out of the context of the record and thus considered may afford substantial support for a fact finding, is that finding therefore conclusive on review, or is it the duty of the reviewing court to examine all the evidence and from such examination determine whether or not the finding is supported by substantial evidence?

2. If the finding becomes conclusive on review because a segregated portion of the testimony, when considered separate and apart from the remainder of the record, affords substantial support to the finding, does a deprivation of due process result?

STATEMENT

Petitioner Kennecott Copper Corporation is the owner of a large open pit copper mine in Bingham Canyon, and of concentrating mills at Magna and Arthur, all in Salt Lake County, Utah. Petitioner Utah Copper Company is the wholly owned, managerial or operating agent of Kennecott, and is engaged as such in the operation of the mining property referred to. Both companies will be referred to in the singular as the "Mining Company." The mine is approximately seventeen miles from the mills, and the mills about one mile from each other.

Petitioner The Independent Association of Mine Workers is an unaffiliated labor organization, membership in which is composed of employees of the Mining Company engaged in the operation of the mine in Bingham Canyon. Petitioner The Independent Association of Mill Workers is an unaffiliated labor organization, membership in which is composed of employees of the Mining Company engaged in the operation of the mills at Magna and Arthur.

The Mine Association was organized in the year 1938 (R. 537, 539), but has not been recognized by the Mining Company for bargaining or other purposes because it had not acquired the majority representation necessary to such recognition (R. 566). Ever since 1919 there has been a labor organization of mine employees known as "Employees' General Committee, Department of Mines," which committee throughout that period has been the recognized bargaining agent for the mine employees (R. 512, 514); and the Employees' General Committee in the suit at bar is sought to be disestablished on charges preferred by the Mine Association (Board's Ex. 1-G, R. 49), the latter insisting that were the

Employees' General Committee denied recognition by the Company and were it disestablished the Mine Association could readily have acquired the bargaining right.

The Mill Association was organized during the winter and early spring of 1938 (R. 189), acquired a majority representation among the mill employees, demanded and on May 24, 1938 after investigation was accorded recognition by the Mining Company as the bargaining representative of its mill employees (R. 206, Board's Ex. 8, R. 1466; R. 210, Board's Ex. 11, R. 1468).

The International Union of Mine, Mill and Smelter Workers, a C. I. O. affiliate, for years engaged in a generally continuous but unsuccessful effort to organize Mining Company's employees at both mine and mills. On the petition of the International Union of Mine, Mill and Smelter Workers and pursuant to a stipulation between the Mining Company, the C. I. O. affiliate, the Mill Association and the National Labor Relations Board (Respondent's Ex. 15, R. 1564), the Board conducted an election among the mill employees on August 24, 1938 (Board's Ex. 2-C, R. 1445). At this election 970 ballots were cast, 481 for the C. I. O., 454 for the Mill Association, and 29 for neither. No contestant having attained a majority, the Board conducted a run-off election September 26, 1938, but the Board denied the Mill Association the right to have its name upon the ballot. (Board's Ex. 2-D, R. 1449). At that election 977 ballots were cast, 282 for the C. I. O. and 660 against the C. I. O. On July 18, 1939, on petition of the Mill Association and again pursuant to an agreement for consent election, to which the Mill Association, the C. I. O. affiliate, the Mining Company and the Board were parties (Board's Ex. 36, R. 1475), the Board conducted a

third election (Mill Ass'n's Ex. 42, R. 1570). 1348 ballots were cast out of a possible 1381. The C. I. O. received 531 votes as against 748 for the Mill Association. By the agreement for consent election (Board's Ex. 36, R. 1475) the Mining Company was *required* to recognize as the exclusive representative of its mill employees for purposes of collective bargaining whichever labor organization received a majority of the votes cast in that election, and the Board certified the election according to its result. (Mill Ass'n's Ex. 42, R. 1570). The Mining Company has continued to recognize the Mill Association as the bargaining representative of its mill employees and the Mill Association has continued to function in that capacity.

The proceedings here involved were instituted by the National Labor Relations Board against the Mining Company upon charges that the Mining Company had interfered with its employees' right of self-organization and with having contributed support to each the mine and mill associations in contravention of the National Labor Relations Act [49 Stat. 452(1) (2); 29 U. S. C. § 158(1) (2)]. The amended complaint and notice of hearing issued out of the Twenty-Second Region on June 1, 1942 (R. 50). Each the mine and mill associations intervened and answered the Board's amended complaint. (R. 57, 60) Hearing was held in Salt Lake City June 15th to July 1st, 1942. The Intermediate Report was submitted September 29, 1942, all the petitioners here duly excepting thereto. (R. 137, 146). The Decision and Order of the Board (R. 176) dated February 20, 1943 is the usual cease and desist order and the Mining Company was ordered to withdraw all recognition from and completely

disestablish the two independent associations and as well the Employees' General Committee.

As stated in the dissenting opinion below and not denied by the majority "The two independent associations, which were in no sense successors to, or continuations of, company dominated committees, were organized freely and voluntarily by the employees at the mill and at the mine respectively."

REASONS FOR GRANTING THE WRIT

In concluding that the Board's findings were supported by substantial evidence, the majority below evidently did not examine all the evidence and from such examination determine whether or not the Board's findings were supported by substantial evidence, but instead segregated from the record "statements and comments made to different employees concerning labor organizations, * urging some employees to join one and urging others to withdraw from another * transfers of employees, * the handling of grievances on Company time, * the use of Company owned property as an office for the transaction of the business of the Mill Association, * the use of a duplicating machine owned by the Company in connection with the business of the Mill Association, and * the furnishing and use of bulletin boards", (R. 1577) and apparently ignoring the balance of the evidence, concluded that the segregated portion referred to afforded substantial support to the finding and that the Board's findings therefore were conclusive on review. In contrast to this conception of the power or duty of a reviewing court, is that indicated by the dissenting opinion of Judge Phillips who, while agreeing "that the statements of the supervisory employees *standing alone* might constitute a basis for a finding of unfair labor

practices," concluded that in the setting provided by all the evidence, "the statements of the supervisory employees lose any probative value and do not constitute substantial evidence justifying the destruction of the associations." It is our understanding that the conception of the power of the reviewing court entertained and pursued in this instance by Judge Phillips and the circuits of like mind properly applies the rule as laid down by this court, *National Labor Relations Board v. Virginia Elec. & P. Co.*, 314 U. S. 469, 86 L. ed. 348; that the conception of the power or duty of the reviewing court as indicated by the opinion of the majority below and practiced by the other circuits possessed of a like understanding is not in accord with the rule declared by this court to be controlling, results in a practical denial to the courts of appeal of power to review the Board's fact findings, and accomplishes a deprivation of due process.

The majority below concluded that "the statements which the Board found were made by a superintendent, foremen, bosses and others having some measure of supervisory authority, were much more than mere casual or desultory expressions constituting only the utterance of individual views," and that "such statements or even suggestions, made at the opportune time, under favorable circumstances, and to the right person, along with other circumstances, may amount to pressure, within the purview of the Act," and so held the Board's findings conclusive upon review. But "a statement which alone may afford substantial support for a fact finding may lose its weight entirely in the face of uncontradicted facts inconsistent with it." *Foote Bros. Gear & Machine Corporation vs. National Labor Relations Board*, 114 F. 2d 611, 622. We are further reminded by the opinion

in that case that the court there searched "*the record* to determine whether the necessary quantum of supporting evidence can be found to sustain the Board's findings," and after such search concluded that the record was "barren of substantial evidence to support" the findings. The opinion from the many angles of its painstaking discussion is peculiarly in point here. That case was sent back to the circuit by this court (311 U. S. 620, 61 S. Ct. 318, 85 L. Ed. 394) because the record was in narrative form, not because the court had erred in its discussion, its search of the record or its analysis of the testimony. Upon a second review in conformity with the mandate of this court the circuit adhered to its previous conclusion, and so the controversy ended. (121 F. 2d 802)

As stated by Judge Phillips, there is evidence of statements of supervisory employees which, if standing alone, might constitute a basis for a finding of unfair labor practices, but in the setting provided by the record in its entirety, "the statements of the supervisory employees lose any probative value and do not constitute substantial evidence justifying the destruction of the associations." We may illustrate the point by brief reference to the record, as follows:

First: Over the signature of its Vice President and General Manager the Mining Company notified its employees at mine and mills in substance and effect that they were free to form, join or assist the A. F. of L., the C. I. O., the independent associations or any other labor organization, and that the Company would not permit its supervisory employees to interfere with, restrain or coerce its employees in the exercise of the rights of the latter under the National Labor Relations Act. Those instructions were thoroughly pub-

licized at times and in the manner as follows:

(a) *At the mills*:

June 24, 1938—Notice posted on the bulletin boards.	(R. 886, Board's Ex. 3, R. 1452)
July 17, 1941—Notice posted on the bulletin boards.	(R. 884, Mill Ass'n's Ex. 6, R. 1569)
July 17, 1941—Notice posted on the bulletin boards.	(R. 884, Respondent's Ex. 1, R. 1538)
July 17, 1941—Letter directed to each supervisory employee over the signatures of the superintendents of the mills respectively.	[R. 885, Respondent's Ex. 2, 2(a) and 3(a)]
Frequent conferences with the heads of departments to consider and discuss decisions of the National Labor Relations Board, at which the departmental heads were made aware of the Board's decisions and were cautioned to keep the posted notices in mind and effectuate the policy therein stated.	(R. 887)
Personal enforcement of the instructions referred to.	(R. 925 to 928, 931, 932, 941, 942, 1019, 1024, 1036.)

(b) *At the mine*:

Instructions from the management to the General Superintendent of Mines and from the latter to the general foremen, the assistant su-	(R. 1068)

perintendent and others in a supervisory capacity.

Posting of notices over the signature of the Vice President and General Manager for periods of at least 60 days and at most conspicuous places throughout the mine on various bulletin boards scattered over a wide territory where the mining operation was being conducted, as follows:	(R. 1068, 1071)
Dec. 4, 1939	(R. 1069, Respondent's Ex. 10, R. 1650.)
Dec. 4, 1939	(R. 1069, Respondent's Ex. 11, R. 1561)
Nov. 13, 1941	(R. 1069, Respondent's Ex. 12, R. 1561)
November 12, 1941—letter over the signature of the General Superintendent of Mines directed to each of the 160 supervisory employees at the mine.	(R. 1071, Respondent's Ex. 13, R. 1562)
Once each month a meeting has been held for many years in the office of the General Superintendent of Mines at which all general foremen, about 20 in number, have been in attendance, and upon those occasions those in attendance have been cautioned against influencing anyone toward any labor organization.	(R. 1072, 1073.)

Personal enforcement of his instructions by the General Superintendent of Mines.	(R. 1073, 1074, 1198, 1214, 1217, to 1218, 1264 to 1265.)

The Company's policy of non-interference with the effort of its employees to organize was publicized and must have been and was clearly understood by its employees, and they were not afraid to join, or make known their affiliation with, the national unions. (R. 309, 310, 723, 749, 751, 693, 699, 714, 478, 602, 961, 1095, 1214, 664.) In the matter of this talk, a gang boss named Simonson was the principal offender. (R. 1290) But the Board's witness, Lantz, who testified to Simonson's demand that the men in his gang take off their C.I.O. buttons, did not remove his, and he was not discriminated against. (R. 715) Lantz testified (R. 710) that "a number of the fellows looked at him quite stupefied, at anything like that being said." And another witness, Gust, testified that he was not afraid of Simonson and that he had dropped out of the Independent Association without fear that his doing so would prejudice him. (R. 1308) Lantz testified Simonson had said that "if C. I. O. ever gains recognition on the hill, I will quit my job." (R. 711) Simonson's explosion was the thing best calculated to persuade his gang to join the C. I. O. Men who carry union buttons in their pockets because afraid to wear them will certainly vote for the union when casting a secret ballot in an election conducted by the Board. Simonson admitted that he had been instructed by his superiors not to interfere with the union activity of the men in his gang and to express no opinion upon that subject. (R. 1291, 1292) Simonson's statements were personal to him.

Moreover it is not unreasonable to conclude that the campaign methods employed by the C. I. O. at this property could and did provoke occasional comment by supervisory employees unfavorable to the C. I. O. Mr. Buchman in the course of his testimony (R. 1109) commented upon statements made over loud speakers and through handbills distributed promiscuously among the Company's employees to the effect that the Company "did not give a care as to who won this war," that "we were only producing three cars a day of our high grade ore from the bottom of the bed, when actually we were producing a million tons a month of that particular ore," that the Company was not attempting to produce the copper that was needed and that the Company would rather see Hitler win this war, and other like expressions. Those loud speakers were located in the town of Bingham Canyon and possessed such volume as to be heard over the Company's mine except at its highest levels. (R. 1302)

There were 131 supervisory employees at the mills (Respondent's Ex. 3(a), R. 1543), and at the mine there were 160 supervisory employees (R. 1074). Giving full credence to the Board's testimony as to the remarks of a certain few of those employees, still, it must be clear from the uncontradicted testimony and after resolving all contradictions in favor of the Board's findings, that those remarks were personal to the employees making them, were unrelated statements and not part of or pursuant to a plan. They certainly were in violation of the Company's explicit and thoroughly publicized and understood orders.

On pages 4-5 of this petition is recounted the result of the balloting upon the occasion of each of the three elections conducted by the Board at the mills over the period of a

year, by secret ballot, of course. At the first election there were cast for the C. I. O. 481 votes and 454 for the mill association, at the second election 282 for the C. I. O. and 660 against it, the Independent's name having been stricken from the ballot by the Board, and at the third election 531 for the C. I. O. and 748 for the mill association. The implication is strong that these employees voted their conviction, that they displayed intelligence and character requisite for self-organization, that the vote at those elections was not provoked by fear of a dominating employer.

> "We are of the opinion that the labor group is now quite aware of its statutory rights, and is instilled with an agressive spirit that, before the passage of the Act, may long have been kept dormant. The still picture of a sheep-like body of laboring men placidly led by a dominating employer, is not representative of the true situation. Since the passage of the Act, the picture has been quite effectively streamlined. * * * Under the view of the modern industrial situation, we surely cannot indulge in any assumption of weakness on the part of the employee." (*E. I. du Pont De Nemours & Co. v. National Labor Relations Board*, 116 F. (2d) 388.)

Again, from the same opinion:

> "In the absence of evidence of any policy of proscribed discrimination, an employer should not be held strictly accountable for every isolated utterance of a policy-making officer concerning union activities. * * * And, where the conduct and actions of the employer fail to indicate any violation of the Act, an assemblage of unrelated, unconnected expressions of opinion does not very deeply impress this Court. * * *
>
> "Sporadic activities on the part of foremen, however, not authorized by the employer and not resulting in interference with or domination of the right of the employees to organize and select bargaining repre-

sentatives of their own choosing, should not be allowed to nullify a choice freely made by a majority of the employees acting on their own initiative."

Martel Mills Corp. v. National Labor Relations Board, 114 F. (2d) 624.

National Labor Relations Board v. Mathieson Alkali Works, Inc., 114 F. (2d) 796.

Humble Oil & Refining Co. v. National Labor Relations Board, 113 F. (2d) 85.

Foote Bros. Gear & Machine Corp. v. National Labor Relations Board, 114 F. (2d) 611.

Diamond T Motor Car Co. v. National Labor Relations Board, 119 F. (2d) 978.

A. D. Staley Mfg. Co. v. National Labor Relations Board, 117 F. (2d) 868.

L. Greif & Bro. v. National Labor Relations Board, 108 F. (2d) 551.

Cupples Co. Manufacturers v. National Labor Relations Board, 106 F. (2d) 100.

National Labor Relations Board v. Gutmann & Co., 121 F. (2d) 756.

Analysis of all the testimony, we respectfully submit, is essential to a judgment upon review within the requirements of the Fifth Amendment.

Second: As stated in the dissenting opinion "there was a complete absence of any discrimination by the Company with respect to hire or tenure." That was true, and the Board through both its counsel and its examiner, emphatically declared proffered proof to refute implications of discrimination was outside the issues and all such offers were rejected. (R. 1200 to 1206; 1219 to 1220; 1261 to 1264.) The majority below in describing the evidence considered by it, included "transfers of employees." But not only were there no dis-

criminatory transfers, but any such contention was disclaimed by the Board as not wtihin the issues raised by its proceeding.

In *National Labor Relations Board vs. Virginia Elec. & P. Co.*, 314 U. S. 469, 86 L. Ed. 348, it appeared that, in addition to certain speeches and bulletins, the Company had engaged in discriminatory conduct, *acts* of a discriminatory and coercive character, not as here, mere verbal expressions prefaced by declarations of the right of employees to affiliate with any labor organization of their choice. We note the following comment from this court's opinion:

> While the Independent was in the process of organization, Edwards, a supervisor, kept meetings of a rival C. I. O. union under surveillance and warned employees that they would be discharged for "messing with the C. I. O." On June 1, Mann, a member of the C. I. O. who had openly protested against an "inside" union at one of the May 11 meetings * * * was discharged for union activities.

But because the Board had apparently based its findings upon the speeches and bulletins rather than upon or in conjunction with *acts* of the company discriminatory in their nature, this court held the Board's findings not substantially supported, that the employer in that case was free to take any side it chose on this controversial issue, and that speeches of the character disclosed by the record, not supplemented by conduct discriminatory and coercive in character, was not sufficient in the light of the First Amendment to sustain the Board's findings. The record in the suit at bar construed most favorably to the findings, by comparison with the record there reviewed, will, we think, be found innocuous. We respectfully direct attention to the following pertinent comment in the course of this court's opinion as follows:

> * * * from the Board's decision we are far from clear that the Board here considered the whole complex of activities, of which the bulletin and the speeches are but parts, in reaching its ultimate conclusion with regard to the Independent. * * *
>
> It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company. * * *
>
> Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful. * * *

To like effect is *Diamond T Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978 at 982, from which we note the following comment:

> The Board also stresses the statement of Superintendent Courval to employee Tishcovske wherein he is alleged to have said that Mr. Tilt would not stand for an outside union and that they would lose their jobs. This statement if made is not to be defended, but * * * Pierce was the man highest in authority at the plant and his subsequent declaration to the men, wherein he openly and frankly told them that the problem was their own and that they were free to join any organization of their own choosing in effect overrode and disavowed the previous expression of Courval.

Third: Of the testimony credited by the majority below, there remains to be mentioned the handling of grievances on Company time, the use of Company owned property as an office for the transaction of the business of the Mill Association, the use of duplicating machines owned by the Company in connection with the business of the Mill Association, and the furnishing and use of bulletin boards, all of which relates to the mills and the Mill Association.

Recognition was granted the Mill Association May 24, 1938. (R. 206; Board's Ex. 8, R. 1466, 210; Board's Ex. 11, R. 1468). The Mill Association had submitted its membership cards to the Company, which checked their number and verified their signatures. (R. 207, 889; Respondent's Ex. 4, R. 1543-1546) It was thus made to appear that the Mill Association represented a majority of the mill employees and was accorded recognition for bargaining purposes. The Company could have done nothing else under the provisions of the National Labor Relations Act, and its recognition of the Mill Association was confirmed by the election of July 18, 1939 and the Board's stipulated requirement that the Mill Association be recognized. (Board's Ex. 36, R. 1475)

The handling of grievances on Company time and the furnishing of bulletin boards for the use of the Mill Association were the result of collective bargaining after the Mill Association's recognition for that purpose. (Board's Ex. 12, R. 233, 1469, 1470, 214, 891, 898, 899, 331 to 333) Granting of concessions to a labor organization as a result of collective bargaining is not an unfair labor practice.

The reference to the use of Company owned property as an office for the transaction of the business of the Mill Asso-

ciation is one to the renting of a room in the Company's Arthur dormintory to the individual who was secretary of the Mill Association. He lived there and paid for his accommodations just as did others in that dormitory. (R. 401, 402.) In this room he kept records of the Mill Association, by which he was employed, and did work for the Association incidental to his secretarial duties. It is also established by the uncontradicted evidence that the recording secretary of the C. I. O. lived in the Magna dormitory (R. 795), and that the headquarters of the C. I. O. in Bingham Canyon were in a building owned by the Company. (R. 1183) The Company gave neither organization anything. Just how or in what manner this action violates the National Labor Relations Act is not and cannot be explained.

As to the use of the Company's duplicating machines in connection with the business of the Mill Association, the Company owned a ditto machine at each its Magna and Arthur mills situated in the basement and on the first floor of the office and administration buildings respectively. Certain secretaries of the Mill Association were employed in clerical capacities at the mills respectively, and used these machines in the course of their Company duties and in behalf of general employee activities. Upon infrequent occasions when the duties of their employment by the Company would permit, it was convenient for them to run off on these ditto machines notices and like material required by the Mill Association. Mill Association stationery only was used. Indeed, the Mill Association actually owned a multigraphing machine, and the secretaries were expected to use it for the Association's purposes. (R. 248, 286, 403.) No claim is made that the Company was aware of this occasional practice, the Com-

pany's General Superintendent of Mills denied any knowledge of it, each of the secretaries testified that he had not asked the Company's permission to use the machines and that the President of the Mill Association himself had asked that the practice be stopped. No showing was made that any of the employees other than the secretaries themselves knew of this use of the machines and no claim can be made that the employees were or could have been in any way influenced by this surreptitious use upon such infrequent occasions. (R. 286, 287, 291, 403, 896, 293, 294, 395, 310.) To us that is very trivial.

The reference to the granting of the check-off in our opinion is equally trivial. The check-off at the mills was granted by the Company after recognition of the Mill Association for bargaining purposes and was responsive to the request of the Mill Association. (R. 210, 301, 302, 303; Board's Ex. 59, R. 1481). Justification for granting the check-off was twofold: (1) state law required that the request be granted upon proper authorization from the employee (§§ 49-14-1, 3 and 6, Utah Code 1943; Board's Ex. 105, R. 1503, Appendix I), and there was such proper authorization; and (2) it was granted as an incident of genuine collective bargaining.

By the decree below these independent associations will be destroyed because certain supervisory employees of the Company had expressed a preference for them as against the nationally affiliated unions, although such expressions were not authorized by either the employer or the independent associations, or either of them, nor had those expressions been brought to the attention or knowledge of either the employer or the independent associations, or either of them, and although such expressions had been forbidden by the

employer as stated in the employer's posted and publicized admonitions and directives. It would seem a reasonable contention that the independent associations should not be destroyed for happenings for which they were not even remotely responsible.

The interest of substantial justice in this and subsequent cases requires that this court make clear the duty of the courts of appeal to test the implications drawn by the Board on the facts it has selected against the contrary implications to be drawn from the rest of the record. The majority below in our opinion misconstrued the substantial evidence rule by treating as substantial intermediate conclusions of fact found to be true by the Board but shown by the face of the record to be unwarranted. The majority below apparently misconceives the substantial evidence rule, as has the Seventh Circuit indicated by its decision in *National Labor Relatons Board v. Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856 at 858, wherein the rule is defined as follows:

> In determining whether or not there is substantial evidence to support the facts found, we look only to the evidence that is favorable to the findings. * * *

and again by the same circuit in *Texas Company v. National Labor Relations Board*, 119 F. (2d) 23, as follows:

> The numerous cases, of which the above-cited ones are typical, make it tolerably clear that the correct rule of law necessitates affirmance if the evidence, however slight, be substantial and support the findings of the Board.

What the last quotation means is not clear to us, but it does not make for a fair review within the pronouncements of this court or within the rule announced by other circuits of the character of the following:

National Labor Relations Board v. Union Pacific Stages, 99 F. (2d) 153 (CCA 9):

> But the courts have not construed this language (as to findings being conclusive) as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

National Labor Relations Board v. Alco Feed Mills, 133 F. (2d) 419, (CCA5):

Wilson & Co. v. National Labor Relations Board, 123 F. (2d) 411 (CCA8).

We had been taught that one may not be judge in his own cause, a proposition that was fundamental to due process. The Board in the proceeding at bar undeniably was judge in its own cause. The Board was the antagonist of these petitioners, an active, agressive partisan. The charge was prepared for the C. I. O. by the Board on a form furnished by the Board for that purpose, and it was subscribed before the Board's regional attorney, who administered the oath to him who signed for the C. I. O. (R. 47, 48) The independent associations were compelled to conduct their defense at their own expense and by their own counsel. No governmental agency defended them, least of all, the judge sitting upon their controversy. The Board, on behalf of the C. I. O., drew and issued the complaint and notice of hearing and amendments, investigated, prepared and tried the cause with its own counsel and at its own expense, to an examiner appointed by it to preside over the hearing initiated by itself, prosecuted by it through its attorney and submitted by it for decision to itself. The C. I. O. was represented by the Board. To that antagonist these independent associations

were compelled to submit their controversy on an issue as to whether or not, to promote C. I. O. objectives, their existence should be terminated. The Board was not an impartial trier of the facts. One who is judge in his own cause cannot judge impartially, never has and never will.

> A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member, makes his antagonist his judge and does not afford due process of law. (*Commissioners of Union Drainage Dist. No. 1 v. Smith et al*, 233 Ill. 417, 84 N. E. 376, 16 L. R. A. (N. S.) 292.)

We do not understand that the requirements of due process may be satisfied merely by preserving the *forms* of judicial procedure. Clearly the requirements of due process will be denied when the order of our antagonist shall be protected against effectual review by the courts. There can be no effectual review if the findings of the Board are conclusive upon the facts whenever there may be segregated out of the record a part of the evidence which shall provide support only when considered separate and apart from the remainder. The circuits seemingly are fast coming to the conclusion that the findings of the Board are conclusive on review if there be any evidence favorable to them, however considered. It is apparent that the questions presented here are of great national importance. The duty of the circuits on review of the findings and orders of this administrative tribunal upon these most partisan issues is not, but should be made clear, that not only in form but as well in substance the requirements of due process shall be preserved.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDIX

The relevant part of Chapter 14, Title 49, Utah Code, 1943 deemed to have an important bearing upon the issues raised by the petition herein is as follows:

49-14-1. *Assignments to Labor Unions—Effect.*

Whenever an employee of any person, firm, school district, private or municipal corporation within the state of Utah executes and delivers to his employer an instrument in writing whereby such employer is directed to deduct a sum at the rate not exceeding three per cent per month, from his wages and to pay the same to a labor organization or union or any other organization of employees as assignee, it shall be the duty of such employer to make such deduction and to pay the same monthly or as designated by employee to such assignee and to continue to do so until otherwise directed by the employee through an instrument in writing.

49-14-3. *Failure to Comply, Penalty.*

Any employer, dealer or processor who wilfully fails to comply with the duty here imposed shall be guilty of a misdemeanor.

This act shall take effect upon approval.
Approved February 20, 1937.